

No. 14559

United States
Court of Appeals
for the Ninth Circuit

EMIL USIBELLI and ROSE P. USIBELLI,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review Decisions of The Tax Court
of the United States

FILED

FEB 15 1955

PAUL P. O'BRIEN,
CLERK

No. 14559

United States
Court of Appeals
for the Ninth Circuit

EMIL USIBELLI and ROSE P. USIBELLI,
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VS.

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Respondent.

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Petition to Review Decisions of The Tax Court
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APPEARANCES

For Petitioners:

A. R. KEHOE, Esq.

For Respondent:

GORDON N. CROMWELL, Esq.

Docket No. 47797

EMIL USIBELLI and ROSE P. USIBELLI,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

5/10/54—Transferred from Judge Oppen to Judge
Murdoch, (Div. 3).

DOCKET ENTRIES

1953

Apr. 13—Petition received and filed. Taxpayer notified. Fee paid.

Apr. 14—Copy of petition served on General Counsel.

Apr. 13—Request for Circuit hearing in Seattle, Wash., filed by taxpayer. 4/16/53—Granted.

May 11—Answer filed by General Counsel.

May 18—Copy of answer served on Taxpayer, Seattle, Wash.

July 22—Hearing set October 13, 1953, Seattle, Wash.

1953

Oct. 16—Hearing had before Judge Oppen on the merits. Stipulation of Facts filed. Motion to consolidate with Docket No. 47798 filed, granted and served. Briefs due 12/21/53; Replies due 1/11/54.

Dec. 7—Transcript of Hearing 10/16/53 filed.

Dec. 11—Brief filed by taxpayer.

Dec. 21—Motion for extension to Jan. 21, 1954, to file brief, filed by General Counsel. 12/23/53-Granted.

1954

Jan. 21—Motion for extension to Feb. 20, 1954, to file brief, filed by General Counsel. 1/25/54-Granted.

Feb. 17—Brief filed by General Counsel.

Feb. 17—Copy of brief served on General Counsel.

Mar. 9—Reply brief filed by General Counsel.

Mar. 11—Reply brief filed by taxpayer. Copy served.

June 30—Memorandum Opinion filed. Judge Murdock. Decision will be entered for the respondent. 7/1/54-Copy served.

July 6—Decision entered. Judge Murdock. Div. 3.

Sept. 22—Petition for review by U. S. Court of Appeals for the Ninth Circuit filed by petitioner.

Sept. 23—Proof of Service filed.

Sept. 23—Designation of contents of record with proof of service thereon filed by petitioner.

Docket No. 47798

EMIL USIBELLI,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

[Printer's Note: Docket Entries and Appearances in Docket No. 47798 are identical to Docket Entries and Appearances in Docket No. 47797 except for the following:]

1953

May 11—Request for Hearing in Seattle, Wash.,
filed by General Counsel.

The Tax Court of the United States

Docket No. 47797

EMIL USIBELLI and ROSE P. USIBELLI,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above named Petitioners hereby petition for a redetermination of the deficiency proposed by the Commissioner of Internal Revenue in income tax for the calendar year 1948, the Notice of Deficiency bearing date of December 19, 1952, Bureau Symbols ADC:App:S:90D, and as a basis for this proceeding allege as follows:

I.

The Petitioners are individuals, husband and wife, residing at Suntrana, Alaska. The income tax return which is involved in this proceeding is that of petitioners for the calendar year 1948. A joint return was filed by them with the Collector of Internal Revenue, Tacoma, Washington.

II.

On December 19, 1952, Respondent mailed Petitioners, at their residence, Suntrana, Alaska, a notice determining a deficiency in income taxes for the calendar year 1948 in the amount of \$5,648.24, substantially all of which amount is in dispute herein. A copy of said notice of deficiency, together with a statement covering same, is hereto attached, marked Exhibit "A", and by this reference made a part hereof.

III.

In determining such deficiency, Respondent erred in the following respect:

(a) In disallowing a depletion deduction of \$8,026.71.

IV.

The facts upon which Petitioners rely in support of the foregoing assignment of error are as follows:

(a) The Petitioner Emil Usibelli operates a coal mine in Alaska. He first began his coal mining operations in Alaska in the year 1943, and has continued to the present time. On April 5, 1946, the Secretary of the Interior, under Fairbanks Serial 06089, granted the United States Army special per-

mission to mine coal from the following land in Alaska:

S $\frac{1}{2}$ NE $\frac{1}{4}$, Sec. 19, NE $\frac{1}{4}$, S $\frac{1}{2}$ NW $\frac{1}{4}$, Sec. 20, T. 125, R. 6 W., F. M., Alaska.

The permit provided that the Army might contract for mining of coal by private parties providing the contractor filed a \$10,000 bond conditioned upon proper mining in accordance with operating regulations satisfactory to the Geological Survey representative. The Army's permit, unless otherwise terminated, was to expire six months after the cessation of hostilities "in the present war", as determined by proclamation of the President or concurrent resolution of the Congress. Emil Usibelli held contracts for mining coal with the Army, and on June 24, 1946, he filed a satisfactory \$10,000 bond executed by the United States Fidelity & Guaranty Company of Baltimore, Maryland, as surety.

The President by Proclamation 2714 of December 31, 1946, proclaimed cessation of hostilities of World War II, effective 12:00 o'clock noon on the same date.

On May 20, 1947, the Army filed a petition for extension of the permit, Fairbanks Serial 06089, and for its amendment to include as additional lands the following described subdivisions:

T. 125, R. 6 W., F. M., Alaska

Sec. 16, SW $\frac{1}{4}$

Sec. 17, S $\frac{1}{2}$

Sec. 18, SE $\frac{1}{4}$

Sec. 19, N $\frac{1}{2}$ NE $\frac{1}{4}$

Sec. 20, N $\frac{1}{2}$ NW $\frac{1}{4}$

On May 21, 1947, Emil Usibelli filed coal lease application, Fairbanks Serial 06561, embracing all of the lands included in the May 20, 1947 permit application of the Army, with the exception of the Southwest Quarter of Section 16. This application was filed with the United States Department of Interior, Bureau of Land Management. The Army advised the Department of Interior, Bureau of Land Management, that it was willing that its permit be cancelled when Mr. Usibelli's application was granted, but it requested that its permit be meanwhile extended in order that no time elapse between the expiration of its permit and the issuance of Mr. Usibelli's coal lease under application Fairbanks Serial 06561.

On August 15, 1947, the Department of Interior, Bureau of Land Management, granted the request of the Army in its application of May 20, 1947, extending their permit from June 30, 1947 covering the additional lands applied for, until the effective date of a lease which might be issued for the land to Emil Usibelli, subject to the filing by Usibelli of the written consent of the United States Fidelity & Guaranty Company of Baltimore, Maryland, to the amendment and the extension of the permit and its agreement to remain bound under its bond, or under a new and satisfactory \$10,000 bond.

On August 26, 1947, Emil Usibelli filed a request that his application for coal lease be amended to include as additional land the Southwest Quarter of Section 16.

The Department of the Interior granted Emil Usibelli his lease on or about April 1, 1949, the Army permit continuing to that date.

Emil Usibelli had various contracts for the sale of coal to the Army during the time he was conducting his coal mining operations in Alaska. On July 1, 1947, he entered into Contract No. WOO-017-qm-1, a negotiated contract with the Army, providing for the sale to the Army of 45,000 tons of sub-bituminous mine run coal at \$5.22 a ton, 25,000 tons of sub-bituminous lump nut coal at \$6.22 a ton, and 30,000 tons of sub-bituminous steam and stoker coal at \$6.22 a ton. Emil Usibelli worked under this contract during the years 1947 and 1948. The coal supplied to the Army under this and other contracts during the years 1948 and 1949 was mined on the property included in the Army's permit, Fairbanks Serial 06089, and in Usibelli's application, Fairbanks Serial 06561, Usibelli's mining rights being granted under a continuing special permit pending the issuance of the April 1, 1949 permanent lease.

Petitioners were entitled to depletion in their coal mining operations under the facts outlined above during the years 1947 and 1948.

Wherefore, Petitioners pray that this Court hear and determine this proceeding, and find that Petitioners properly reported their income tax in their return for the calendar year 1948, and properly paid their tax thereon, and that this Court deter-

mine such other and further relief as may be proper in the premises.

/s/ A. R. KEHOE,

Counsel for Petitioners

Duly Verified.

EXHIBIT "A"

1215 Smith Tower Building
Seattle 4, Washington

ADC:App:S:90D—S:DM

Dec. 19, 1952

Mr. Emil Usibelli
Mrs. Rose P. Usibelli
Suntrana, Alaska

Dear Mr. and Mrs. Usibelli:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1948 discloses a deficiency of \$5,648.24 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 150 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for the redetermination of the deficiency. In counting the 150 days you may not exclude any day unless the 150th day is a Saturday, Sunday, or legal holiday in the District of Columbia, in which event that day is not counted as the 150th day. Otherwise Saturdays, Sundays, and legal

holidays are to be counted in computing the 150-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Assistant District Commissioner, Appellate, 1215 Smith Tower, Seattle 4, Washington. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

John S. Graham,

Acting Commissioner of Internal
Revenue

/s/ By J. B. Harlacher,

Asst. District Commissioner,
Appellate

Enclosures: Statement, Form 1276, Agreement
Form—DMitchell:hvs.

ADC:App:90D—S:DM

Statement

Emil and Rose P. Usibelli, Husband and Wife,
Suntrana, Alaska.

Tax liability for the taxable year ended December 31, 1948:

Year	Kind of Tax	Deficiency
1948	Income	\$5,648.24

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated January 11, 1951; to your protest dated May 5, 1951; and to the statements made at the conferences held on August 8, 1952 and September 15, 1952.

A copy of this letter and statement has been mailed to your representative, Mr. Vernon L. Maxfield, White Building, Seattle, Washington, in accordance with the authority contained in the power of attorney executed by you.

Taxable Year Ended December 31, 1948

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return.....	\$48,850.40
Additional income and unallowable deductions:	
(a) Depletion	\$8,026.71
(b) Additional salary accrued	2,594.19 10,620.90
<hr/>	
Net income adjusted	\$59,471.30

EXPLANATION OF ADJUSTMENTS

(a) It has been determined that you had no economic interest in the coal in place that was being mined in 1948 for the United States Army under certain contracts. Therefore, percentage depletion claimed in the amount of \$8,026.71 is disallowed.

(b) It has been determined that your income tax return for 1948 was required to be made on the accrual basis, and that the total salary liability accrued to Emil Usibelli in 1948 by the Usibelli Coal Mine, Inc., was \$12,000.00. As there was reported on the return only \$9,905.81 from such source, your income has been increased by \$2,594.19 to correct.

Net income	\$59,471.30
Less: Exemptions	2,400.00
<hr/>	
Net income subject to tax.....	\$57,071.30
<hr/>	

Joint return computation:

Half of net income subject to tax.....	\$28,535.65	
Tentative tax	\$12,312.10	
Less: Reduction		
17% of \$400.00	\$ 68.00	
12% of \$11,912.10	1,429.45	1,497.45
Tentative normal tax and surtax.....	\$10,814.65	
Combined normal tax and surtax (2 x \$10,814.65)	\$21,629.30	
Income tax liability	\$21,629.30	
Income tax liability disclosed by the return, original account No. 6-329029	15,981.06	
Deficiency of income tax	\$ 5,648.24	

[Endorsed]: T.C.U.S. Filed April 13, 1953.

[Title of Tax Court and Cause No. 47797.]

ANSWER

Comes Now the Commissioner of Internal Revenue, by his attorney, Charles W. Davis, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed herein, admits and denies as follows:

1. Admits the allegations contained in paragraph I of the petition.
2. Admits the allegations contained in paragraph II of the petition.
3. (a) Denies that the Commissioner erred in his determination of the deficiency as shown by the

notice of deficiency from which the petitioners' appeal is taken. Specifically denies that he erred in the manner and form as alleged in subparagraph (a) of paragraph III of the petition.

4. (a) For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the allegations contained in subparagraph (a) of paragraph IV of the petition.

5. Denies generally and specifically each and every material allegation contained in the petition, not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that petitioners' appeal be denied and that the Commissioner's determination be approved.

/s/ CHARLES W. DAVIS, JOD
Chief Counsel, Bureau of
Internal Revenue

Of Counsel: Wilford H. Payne, District Counsel;
John H. Pigg, Appellate Counsel; John O. Durkan, Assistant Appellate Counsel; Gordon N. Cromwell, Special Attorney, Bureau of Internal Revenue.

[Endorsed]: T.C.U.S. Filed May 11, 1953.

The Tax Court of the United States

Docket No. 47798

EMIL USIBELLI, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above named Petitioner hereby petitions for a redetermination of the deficiency proposed by the Commissioner of Internal Revenue in income tax for the calendar year 1947, the Notice of Deficiency bearing date of December 19, 1952, Bureau Symbols ADC:App:S:90D, and as a basis for this proceeding alleges as follows:

I.

The Petitioner is an individual residing at Suntrana, Alaska. The income tax return which is involved in this proceeding is that of Petitioner for the calendar year 1947. The 1947 return was filed with the Collector of Internal Revenue, Tacoma, Washington.

II.

On December 19, 1952, Respondent mailed Petitioner, at his residence, Suntrana, Alaska, a notice determining a deficiency in income taxes for the calendar year 1947 in the amount of \$1,476.69, a penalty under Section 294(d)(1) of the Internal Revenue Code of \$132.91, and a penalty under Section 294(d)(2) of the Internal Revenue Code of

\$88.60, all of which amounts are in dispute herein. A copy of said notice of deficiency, together with a statement covering same, is hereto attached, marked Exhibit "A", and by this reference made a part hereof.

III.

In determining such deficiency and penalties, Respondent erred in the following respect:

(a) In disallowing a depletion deduction of \$5,596.54.

IV.

The facts upon which Petitioner relies in support of the foregoing assignment of error are as follows:

(a) The Petitioner Emil Usibelli operates a coal mine in Alaska. He first began his coal mining operations in Alaska in the year 1943, and has continued to the present time. On April 5, 1946 the Secretary of the Interior under Fairbanks Serial 06089, granted the United States Army special permission to mine coal from the following land in Alaska:

S $\frac{1}{2}$ NE $\frac{1}{4}$, Sec. 19, NE $\frac{1}{4}$, S $\frac{1}{2}$ NW $\frac{1}{4}$, Sec. 20, T. 125, R. 6 W., F. M., Alaska.

The permit provided that the Army might contract for mining of coal by private parties providing the contractor filed a \$10,000 bond conditioned upon proper mining in accordance with operating regulations satisfactory to the Geological Survey representative. The Army's permit, unless otherwise terminated, was to expire six months after the cessation of hostilities "in the present war", as de-

terminated by proclamation of the President or concurrent resolution of the Congress. Emil Usibelli held contracts for mining coal with the Army, and on June 24, 1946, he filed a satisfactory \$10,000 bond executed by the United States Fidelity & Guaranty Company of Baltimore, Maryland, as surety.

The President by Proclamation 2714 of December 31, 1946, proclaimed cessation of hostilities of World War II, effective 12:00 o'clock noon on the same date.

On May 20, 1947, the Army filed a petition for extension of the permit, Fairbanks Serial 06089, and for its amendment to include as additional lands the following described subdivisions:

T. 125, R. 6 W., F. M., Alaska

Sec. 16, SW $\frac{1}{4}$

Sec. 17, S $\frac{1}{2}$

Sec. 18, SE $\frac{1}{4}$

Sec. 19, N $\frac{1}{2}$ NE $\frac{1}{4}$

Sec. 20, N $\frac{1}{2}$ NW $\frac{1}{4}$

On May 21, 1947, Emil Usibelli filed coal lease application, Fairbanks Serial 06561, embracing all of the lands included in the May 20, 1947, permit application of the Army, with the exception of the Southwest Quarter of Section 16. This application was filed with the United States Department of Interior, Bureau of Land Management. The Army advised the Department of Interior, Bureau of Land Management, that it was willing that its permit be cancelled when Mr. Usibelli's application was granted, but it requested that its permit be

meanwhile extended in order that no time elapse between the expiration of its permit and the issuance of Mr. Usibelli's coal lease under application Fairbanks Serial 06561.

On August 15, 1947, the Department of Interior, Bureau of Land Management, granted the request of the Army in its application of May 20, 1947, extending their permit from June 30, 1947 covering the additional lands applied for, until the effective date of a lease which might be issued for the land to Emil Usibelli, subject to the filing by Usibelli of the written consent of the United States Fidelity & Guaranty Company of Baltimore, Maryland, to the amendment and the extension of the permit and its agreement to remain bound under its bond, or under a new and satisfactory \$10,000 bond.

On August 26, 1947, Emil Usibelli filed a request that his application for coal lease be amended to include as additional land the Southwest Quarter of Section 16.

The Department of the Interior granted Emil Usibelli his lease on or about April 1, 1949, the Army permit continuing to that date.

Emil Usibelli had various contracts for the sale of coal to the Army during the time he was conducting his coal mining operations in Alaska. On July 1, 1947, he entered into Contract No. WOO-017-qm-1, a negotiated contract with the Army, providing for the sale to the Army of 45,000 tons of sub-bituminous mine run coal at \$5.22 a ton, 25,000 tons of sub-bituminous lump nut coal at \$6.22 a ton, and 30,000 tons of sub-bituminous steam and stoker

coal at \$6.22 a ton. Emil Usibelli worked under this contract during the years 1947 and 1948. The coal supplied to the Army under this and other contracts during the years 1948 and 1949 was mined on the property included in the Army's permit, Fairbanks Serial 06561, Usibelli's mining rights being granted under a continuing special permit pending the issuance of the April 1, 1949 permanent lease.

Petitioner had a depletable interest in his coal mining operations under the facts outlined above during the years 1947 and 1948.

Wherefore, petitioner prays that this Court hear and determine this proceeding, and find that petitioner properly reported his income tax in his return for the calendar year 1947, and properly paid his tax thereon, and that this Court determine such other and further relief as may be proper in the premises.

/s/ A. R. KEHOE,
Counsel for Petitioner

Duly Verified.

EXHIBIT "A"

1215 Smith Tower Building
Seattle 4, Washington

ADC:APP:S:90D—S:DM

Dec. 19, 1952

Mr. Emil Usibelli, Suntrana, Alaska

Dear Mr. Usibelli:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1947, discloses a deficiency of \$1,-476.69 and \$221.51 in penalties as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 150 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for the redetermination of the deficiency. In counting the 150 days you may not exclude any day unless the 150th day is a Saturday, Sunday or legal holiday in the District of Columbia, in which event that day is not counted the 150th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 150-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Assistant District Commissioner, Appellate, 1215 Smith Tower, Seattle 4, Washington. The

signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

John S. Graham, Acting Commissioner
of Internal Revenue

/s/ By J. B. Harlacher, Asst. District
Commissioner, Appellate

Enclosures: Statement, Form 1276, Agreement form
D. Mitchell; hvs

Statement

ADC:App:90D—S:DM

Mr. Emil Usibelli, Suntrana, Alaska.

Tax Liability for the taxable year ended December 31, 1947:

			Penalties	
Year	Kind of Tax	Deficiency	Sec. 294(d) (1)	Sec. 294(d) (2)
1947	Income	\$1,476.69	\$132.91	\$88.60

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated January 11, 1951; to your protest dated May 5, 1951; and to the statements made at the conferences held on August 8, 1952 and September 15, 1952.

Inasmuch as you failed to file a 1947 Declaration of Estimated Tax and make any prepayment of your 1947 income tax liability, it is determined that you are liable for the following penalties as provided by Section 294(d) of the Internal Revenue Code.

Penalty for Failure to File Declaration of Estimated Tax under
Section 294(d) (1) of the Internal Revenue Code

Amount due and unpaid	Installment due date	Rate	Addition to tax
\$369.17	March 15, 1947.....	10%	\$36.92
\$369.17	June 15, 1947	10%	36.92
\$369.17	September 15, 1947	10%	36.92
\$369.18	January 15, 1948	6%	22.15
Total.....			<u>\$132.91</u>

Penalty for Substantial Underestimation of Declaration of Esti-
mated Tax under Section 294(d) (2) of the Internal Revenue
Code

Corrected Tax\$1,476.69

80% of Corrected Tax\$1,181.35

Less: Withholding Tax actually withheld.....\$ -0-

Estimated Tax -0- -0-

(a) Tentative Addition to Tax.....\$1,181.35

Corrected Tax\$1,476.69

Less: Withholding Tax actually withheld \$ -0-

Estimated Tax -0- -0-

Difference\$1,476.69

(b) Tentative Addition to Tax (6% of \$1,476.69).....\$ 88.60

Addition to Tax:

Tentative (a) or (b) whichever is lesser.....\$ 88.60

A copy of this letter and statement has been mailed to your
representative, Mr. Vernon L. Maxfield, White Building, Seattle,
Washington, in accordance with the authority contained in the
power of attorney executed by you.

Taxable Year Ended December 31, 1947

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return.....\$5,096.54

Additional income and unallowable deductions

(a) Depletion disallowed 5,596.54

Net income adjusted\$10,693.08

EXPLANATION OF ADJUSTMENTS

(a) It has been determined that you had no economic interest in the coal in place that was being mined in 1947 for the United States Army under certain contracts. Therefore, percentage depletion claimed in the amount of \$5,596.54 is disallowed.

Net income	\$10,693.08
Less: Exemptions	2,000.00
<hr/>	
Balance subject to normal tax and surtax.....	\$ 8,693.08
Tentative normal tax and surtax.....	2,195.65
Less: 5% of tentative tax.....	109.78
<hr/>	
Income tax liability	\$ 2,085.87
Income tax liability disclosed by the return, original account No. 3022717	609.13
Deficiency of income tax.....	1,476.69
<hr/> <hr/>	

[Endorsed]: T.C.U.S. Filed April 13, 1953.

[Title of Tax Court and Cause No. 47798.]

ANSWER

Comes Now the Commissioner of Internal Revenue, by his attorney, Charles W. Davis, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed herein, admits and denies as follows:

1. Admits the allegations contained in paragraph I of the petition.
2. Admits the allegations contained in paragraph II of the petition.
3. (a) Denies that the Commissioner erred in his determination of the deficiency and penalties as shown by the notice of deficiency from which the

petitioner's appeal is taken. Specifically denies that he erred in the manner and form as alleged in subparagraph (a) of paragraph III of the petition.

4. (a) For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the allegations contained in subparagraph (a) of paragraph IV of the petition.

5. Denies generally and specifically each and every material allegation contained in the petition, not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that petitioner's appeal be denied and that the Commissioner's determination be approved.

/s/ CHARLES W. DAVIS, JOD
Chief Counsel, Bureau of
Internal Revenue

Of Counsel: Wilford H. Payne, District Counsel;
John H. Pigg, Appellate Counsel; John O. Durkan, Assistant Appellate Counsel; Gordon N. Cromwell, Special Attorney, Bureau of Internal Revenue.

[Endorsed]: T.C.U.S. Filed May 11, 1953.

[Title of Tax Court and Causes No. 47797-98.]

MOTION TO CONSOLIDATE

Now come the petitioners by their attorney, A. R. Kehoe, and in accordance with the Stipulation of Facts hereinbefore filed:

Request that the Court consolidate these proceedings for hearing.

/s/ A. R. KEHOE,

Attorney for Petitioners

[Endorsed]: T.C.U.S. Granted Oct. 16, 1953.

[Endorsed]: T.C.U.S. Filed Oct. 16, 1953.

MINUTES OF PROCEEDINGS

The Tax Court of the United States

Date: Oct. 16, 1953. Place: Seattle, Wash. Docket No. 47797-47798.

Proceeding: Emil Usibelli and Rose P. Usibelli-Emil Usibelli.

Assigned to Judge Clarence V. Oppen. Division No. 14.

Counsel: For Petitioner, A. R. Kehoe, Esq., Coleman Building, Seattle 4, Washington; for Respondent, Gordon N. Cromwell, Esq.

Stenographic Reporter: Marsh. Hearing 10:30-10:35 a.m. Sub. Transcript Ordered: Yes. On the merits: Yes.

Filed at hearing: Stipulation as to the facts. Motion to consolidate—served.

Petitioner's brief: December 21, 1953.

Respondent's brief: December 21, 1953.

Reply briefs: January 11, 1954.

Exhibits: See stipulation of facts for other exhibits. P-Radiogram.

/s/ CLIFTON H. JACK,
Deputy Clerk

[Title of Tax Court and Causes No. 47797-98.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties to these proceedings, by their respective attorneys, that the following facts are true, and that the same may be so taken and considered by the Court as offered in evidence by said parties; provided, however, that this stipulation shall be without prejudice to the right of any of said parties to introduce other and further evidence not inconsistent with the facts herein stipulated.

1. Subject to the approval of the Court, these proceedings may be consolidated for hearing.

2. At all times material herein petitioners were individuals, husband and wife, residing at Suntrana, Alaska. Their returns for the calendar years involved, 1947 and 1948, were filed with the Collector of Internal Revenue for the District of Washington, and are attached hereto as respondent's Exhibits A and B and made a part hereof by this reference. The coal mining operations involved

in these proceedings were returned on an accrual basis. The individual return of Emil Usibelli for the calendar year 1947 is involved in Docket No. 47798. The joint return of Emil Usibelli and Rose P. Usibelli for the calendar year 1948 is involved in Docket No. 47797.

3. The statutory notice of deficiency (a copy of which is attached to the petition Docket No. 47798 and marked Exhibit "A") was mailed to Emil Usibelli on December 19, 1952. The said notice of deficiency advised Emil Usibelli that for the taxable year 1947 respondent had determined a deficiency in his income taxes of \$1,476.69, a section 294(d)(1), I.R.C., penalty of \$132.91 and a section 294(d)(2) penalty of \$88.60. This entire deficiency and all the penalties so determined for 1947 are in dispute and are involved in Docket No. 47798.

4. The statutory notice of deficiency (a copy of which is attached to the petition Docket No. 47797 and marked Exhibit "A") was mailed to Emil Usibelli and Rose P. Usibelli on December 19, 1952. The said notice of deficiency advised Emil Usibelli and Rose P. Usibelli that for the taxable year 1948 respondent had determined a deficiency in their income taxes of \$5,648.24. Of the total deficiency so determined of \$5,648.24, only that amount is in dispute in Docket No. 47797 which relates to disallowance of a depletion deduction claimed in 1948 of \$8,026.71.

5. In the event the Court finds for the petitioners for the years 1947 and 1948, then the judgment of the Court should be entered subject to a Rule 50

computation. On the other hand, should the Court find for the respondent for the years 1947 and 1948, then the judgment of the Court should be for the deficiencies as determined by the statutory notices of deficiency, and the penalties for 1947 if determined to be applicable.

6. The only issue involved is the question of whether, in determining the net income of petitioners from their coal mining operation in Alaska, they are entitled to a deduction for depletion in the amount of \$5,596.54 in the year 1947, and \$8,026.71 for the year 1948.

7. The petitioner, Emil Usibelli (hereinafter referred to as Usibelli), has engaged in mining coal in Alaska from 1945 to the present time. Usibelli entered into contracts to furnish coal to the United States Army during the period from July 1, 1946 to June 30, 1948. The coal supplied to the Army under these contracts was strip-mined at Suntrana, Alaska, on property included in the Army's permit, Fairbanks Serial No. 06089.

8. On April 5, 1946, the Secretary of the Interior of the United States granted the United States Army under Fairbanks Serial No. 06089, special permission to mine coal from the following lands in Alaska:

The South Half of the Northeast Quarter of Section 19, the Northeast Quarter in the South Half of the Northwest Quarter of Section 20, Township 12 S., Range 6 W. F.M., Alaska.

The permit provided that the Army might contract for the mining of coal by private parties providing

the contractor filed a \$10,000 bond conditioned upon proper mining in accordance with operating regulations and to the satisfaction of the Geological Survey representative. The Army's permit, unless otherwise terminated, was to expire six months after the cessation of hostilities in World War II, as determined by proclamation of the President or concurrent resolution of Congress. On June 24, 1946, Usibelli filed a satisfactory \$10,000 bond executed by the United States Fidelity & Guaranty Company of Baltimore, Maryland, as surety.

9. On July 1, 1946, the Army and Usibelli entered into a contract, Supply Contract No. W 7500 qm-24, O.I. No. C-47-2, providing for the furnishing of 40,000 tons of mine run coal at a unit price of \$4.75 a ton, or a total of \$190,000, and 30,000 tons of lump nut coal, at a unit price of \$5.75 a ton, or a total of \$172,500, the aggregate amount of the contract being \$362,500. Attached hereto, and made a part hereof by this reference, marked Exhibit 3-C, is a copy of this contract.

10. On September 3, 1946, Usibelli made an application to the Office of Price Administration in Juneau, Alaska, for an increase in the maximum prices for coal produced by him; and on September 30, 1946, he was granted an increase in mine run coal to \$5.47 per ton. Attached hereto and made a part hereof by this reference, marked Exhibit 4-D, is a copy of the ruling of the Office of Price Administration, Juneau, Alaska, granting this increase in price to Usibelli.

11. On October 22, 1946, under Modification No.

1, contract No. W 7500 qm-24, O.I. C-47-2 was amended to provide for an increase in the contract amount by \$28,800. This increase resulted from the increase in the price of mine run coal from \$4.75 to \$5.47 per ton, pursuant to the authorization of the Office of Price Administration, dated September 30, 1946. Attached hereto and made a part hereof by this reference, marked Exhibit 5-E, is a copy of Modification No. 1.

12. On May 1, 1947, contract No. W 7500 qm-24, O.I. C-47-2, was amended to change Item 2 of Schedule of Supplies from lump nut coal to mine run coal, effective November 1, 1946, and changing the unit price from \$5.75 a ton to \$5.47 a ton, decreasing the contract amount by \$8,400, the new total of the contract being changed from \$391,300 to \$382,900, and extending the delivery date of the balance of the coal to September 30, 1947. Attached hereto and made a part hereof by this reference, marked Exhibit 6-F, is Modification No. 2.

13. On May 8, 1947, the Headquarters, Alaska General Depot, mailed Usibelli an invitation to bid on the furnishing of coal to the Army for the fiscal year 1948 (1 July 1947 to 30 June 1948). Attached hereto and made a part hereof by this reference, marked Exhibit 7-G, is a copy of the invitation to bid.

14. On May 15, 1947, Usibelli submitted a bid to the Director of Supply covering bid prices on 70,000 tons, 100,000 tons, and 125,000 tons. Attached hereto and made a part hereof by this reference, marked Exhibit 8-H, is a copy of Usibelli's bid.

15. On May 19, 1947, the Headquarters, Alaska General Depot, advised petitioner that it was the firm intention of the Army to enter into a contract with petitioner to furnish the Army with 70,000 tons of coal during the period July 1, 1947 to June 30, 1948. Attached hereto and made a part hereof by this reference, marked Exhibit 9-I, is a copy of the letter of Headquarters, Alaska General Depot, dated May 19, 1947.

16. The President of the United States by proclamation 2714, dated December 31, 1946, proclaimed cessation of hostilities of World War II, effective twelve o'clock noon on that same date. Under the terms of the Army permit, Fairbanks Serial No. 06089, as stated in paragraph 8 above, the permit was to expire six months after such Presidential proclamation; so in this instance the expiration date became June 30, 1947. On May 20, 1947, the Army filed a petition for an extension beyond June 30, 1947 of the permit, Fairbanks Serial 06089, and for its amendment to include as additional lands, the following described subdivision:

Township 12 S., Range 6 W. F.M. Alaska

Section 16, Southwest Quarter

Section 17, South one-half

Section 18, Southeast one-quarter

Section 19, North one-half, Northeast one-quarter

Section 20, North one-half, Northwest one-quarter

Attached hereto and made a part hereof by this

reference is Exhibit 10-J, which is a letter dated November 3, 1947, from Headquarters of Alaskan Service Base, signed by W. I. Waugaman, Major, Quartermaster Corps, Assistant Base Quartermaster, which incorporated a copy of Decision "N" dated August 15, 1947, which amended the Army coal permit and extended it to December 31, 1947, which documents cover the above stated facts.

17. On May 21, 1947, Usibelli filed coal lease application, Fairbanks Serial 06561, embracing all of the lands included in the May 20, 1947, permit application of the Army, with the exception of the Southwest Quarter of Section 16. This application was filed with the United States Department of the Interior, Bureau of Land Management. The Army indicated to the Department of Interior, Bureau of Land Management, that it was willing that its permit be cancelled when such cancellation was in the interest of the Government. Attached hereto, marked Exhibit 11-K, and made a part hereof by this reference, is the decision of the United States Department of the Interior, Bureau of Land Management, dated May 3, 1948, covering the above stated facts.

18. On June 15, 1947, Contract No. W 7500-qm-24, O.I. No. C-47-2, was further amended to extend delivery date of the remaining coal to December 31, 1947. Attached hereto and made a part hereof by this reference, marked Exhibit 12-L, is Modification No. 3.

19. On August 15, 1947, the Department of Interior, Bureau of Land Management, granted the

request of the Army in its application of May 20, 1947, extending the Army's permit from June 30, 1947, covering the additional lands applied for, until the effective date of a lease which might be issued for the lands. See Exhibit 11-K.

20. On August 25, 1947, Headquarters, Alaskan Service Base Office of the Purchasing and Contracting Officer, sent an order for 45,000 tons of mine run coal, 25,000 tons of lump nut coal, and 30,000 tons of steam and stoker coal, pending the execution of a definite contract to be executed by September 30, 1947, or any subsequent date mutually agreed upon. Attached hereto and made a part hereof by this reference, marked Exhibit 13-M, is a copy of the order of the Headquarters, Alaskan Service Base Office of the Purchasing and Contracting Officer, dated August 25, 1947.

21. Under date of July 1, 1947, the Army and Usibelli entered into the definitive contract, Contract No. WOO-017-qm-1 providing for the furnishing of 45,000 tons of mine run coal at a unit price of \$5.22 a ton, or a total of \$234,900, 25,000 tons of lump nut coal at a unit price of \$6.22 a ton, or a total of \$155,500, and 30,000 tons of steam and stoker coal at a unit price of \$6.22 a ton, or a total of \$186,600, the aggregate amount of the contract being \$577,000. Attached hereto and made a part hereof by this reference marked Exhibit 14-N, is a copy of Contract No. WOO-017-qm-1.

22. About August 26, 1947, Usibelli filed a request that his application for coal lease be amended

to include as additional land the Southwest Quarter of Section 16. See Exhibit 11-K.

23. On November 3, 1947, Usibelli was requested to file written consent of the surety, United States Fidelity & Guaranty Company of Baltimore, Maryland, to the amendment and extension of the Army permit, and its agreement to remain bound under its bond, or a new and satisfactory \$10,000 bond. See Exhibit 10-J. On December 1, 1947, such consent and agreement was filed with Department of the Interior. See Exhibit 11-K.

24. On May 3, 1948, the Department of Interior requested that Usibelli submit his written consent to certain conditions before acting on his lease application Fairbanks 06561. See Exhibit 11-K.

25. On July 2, 1948, Contract No. WOO-017-qm-1, was amended to extend the time of performance of the contract to July 31, 1948. Attached hereto and made a part hereof by this reference, marked Exhibit 15-O, is a copy of a letter of July 2, 1948, from Headquarters, United States Army, Alaska, signed by C. W. Oatley, Assistant Adjutant General, covering the extension of time of performance.

26. The Department of the Interior granted Usibelli, his lease on or about April 1, 1949, the Army permit continuing to that date.

/s/ A. R. KEHOE,

Counsel for Petitioners

/s/ KENNETH W. GEMMILL,

Acting Chief Counsel, Internal Revenue Service,

Counsel for Respondent

EXHIBIT No. 10-J

(Copy)

Headquarters Alaskan Service Base
APO 942, c/o Postmaster, Seattle, Washington

Mr. Emil Usibelli 3 November 1947
Usibelli Coal Company, Healy Forks, Alaska.

Dear Mr. Usibelli:

Transmitted herewith is a copy of Decision "N", dated August 15, 1947, which amends the Army Coal Permit and extends it to December 31, 1947, or until the effective date of a lease which may be issued.

I call your particular attention to Page 2 of the Decision which states that the amendment and extension is: "subject to the filing by Usibelli of the written consent of the surety company to the amendment and extension of the permit, and its agreement to remain bound under its bond, or a new and satisfactory \$10,000 bond."

The consent, or new bond, should be filed in the District Land Office, Bureau of Land Management, Fairbanks, Alaska, as soon as possible so that the decision can become final.

It is requested that this office be notified of the action you have taken on the above.

Very truly yours,

/s/ W. I. Waugaman, Major, QMC
Asst. Base Quartermaster

WIW:ls

In Reply Refer to: Fairbanks 06089 "N" United States Army. (Copy)

United States Department of the Interior, Bureau of Land Management, Washington 25, D. C.

Decision

United States Army: Coal August 15, 1947

Permit Amended and Extended

Under Fairbanks serial 06089, the Secretary of the Interior on April 5, 1946, granted the United States Army special permission to mine coal from the S $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 19, NE $\frac{1}{4}$, S $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 20, T. 12 S., R. 6 W., F.M., Alaska, and held that if the Army contracts for mining of coal by private parties, such contractor must file a \$10,000 bond conditioned upon proper mining in accordance with operating regulations and to the satisfaction of the Geological Survey representative. The Secretary also held that the permit, unless otherwise terminated, would expire six months after the cessation of hostilities "in the present war" as determined by proclamation of the President, or concurrent resolution of the Congress.

On June 24, 1946, the operator, Emil Usibelli, filed a satisfactory \$10,000 bond executed by the United States Fidelity and Guaranty Company of Baltimore, Maryland, as surety.

The President by Proclamation 2714 of December 31, 1946, proclaimed cessation of hostilities of World War No. 2, effective 12 o'clock noon on the same date.

On May 20, 1947, the United States Army, through the Adjutant General's Alaskan Headquarters Department, filed a petition for extension of the permit and for its amendment to include as additional lands the following described subdivisions:

T. 12 S., R. 6 W., F.M. Alaska: Sec. 16, SW $\frac{1}{4}$; Sec. 17, S $\frac{1}{2}$; Sec. 18, SE $\frac{1}{4}$; Sec. 19, N $\frac{1}{2}$ NE $\frac{1}{4}$; Sec. 20, N $\frac{1}{2}$ NW $\frac{1}{4}$.

The records show that the additional lands are necessary for continued operation and extension of the strip mine on the lands covered by the special permit, and that all of the lands comprise a logical leasing unit. Coal lease application, Fairbanks 06561, embracing all of the lands, with exception of the SW $\frac{1}{4}$ Sec. 16, was filed May 21, 1947. The lease application is under consideration. The Army has indicated its willingness for the permit to be canceled when such cancellation is in the interest of the Government. It appears that the parties in interest desire the permit extended as specified herein, in order that no time may elapse between the expiration of the permit and the issuance of a coal lease under application, Fairbanks 06561.

In view of the foregoing and of the fact that there appears to be no objection, the permit is amended to include the additional lands applied for, and extended from June 30, 1947, the end of six months from date of the proclamation of the President, to December 31, 1947, or until the effective date of a lease which may be issued for the lands, subject to the filing by Usibelli of the written consent of the above named surety company

to the amendment and extension of the permit, and its agreement to remain bound under its bond, or a new and satisfactory \$10,000 bond.

/s/ Fred W. Johnson, Director

I concur: Aug. 4, 1947.

/s/ Julian D. Sears, Acting Director,
Geological Survey

Approved: Aug. 15, 1947.

/s/ Oscar L. Chapman,
Under Secretary of the Interior

cc: DLO. (2) 7-18-rr G. S. T. V. Dillon.

EXHIBIT No. 11-K

In Reply refer to: Fairbanks 06561-06089 "D. A"
United States Department of the Interior, Bureau
of Land Management, Washington 25, D. C.

Decision

Emil Usibelli: Coal.

May 3, 1948

Consent Required

On May 21, 1947, the above named party filed coal lease application Fairbanks 06561 embracing the following described land:

T. 12 S., R. 6 W., F.M., Alaska, Sec. 17, S $\frac{1}{2}$;
Sec. 18, SE $\frac{1}{4}$; Sec. 19, NE $\frac{1}{4}$; Sec. 20, N $\frac{1}{2}$.

On August 26, 1947, the Acting Manager of the District Land Office transmitted a copy of a letter from the applicant requesting that his application

be amended to include as additional land the SW $\frac{1}{4}$ Sec. 18, township and range mentioned.

All of the lands listed are embraced in special permit Fairbanks 06089 granted by the Secretary of the Interior to the United States Army for the purpose of mining coal. The permit was on August 15, 1947, extended by the Secretary until the effective date of a lease which may be issued for the lands subject to the filing by the operator, namely Emil Usibelli, of the written consent of the United States Fidelity and Guaranty Company, surety on the \$10,000 permit bond, to such extension and the surety's agreement to remain bound under the bond, or a new and satisfactory \$10,000 bond. Such consent and agreement was filed in this office on December 1, 1947.

The records shows that continued operation of the mine on the lands is essential to meet fuel needs of the Army in the locality involved. Accordingly, all of the above described lands (1120 acres) may be segregated as coal leasing block No. 29, Nenana Coal Field, Alaska, and offered for lease at public auction at a minimum bonus of \$1 an acre subject to a royalty of 10 cents a ton, mine run, a minimum investment of \$100 an acre and a \$10,000 bond.

If and when the lands are offered for lease, the notice for publication of the offer will provide that if one other than Usibelli is the highest bidder at the auction he will be required to pay Usibelli the reasonable present value of all permanent mining improvements built for the development of the property (not including stripping and air field con-

struction) which have not been amortized in connection with Usibelli's contract with the Army. If Usibelli is the successful bidder, the investment requirement will be recognized as having been made.

Before action can be taken with respect to offering the lands for lease, it will be necessary for Usibelli to comply with the following requirements:

1. Submit his written consent to the above mentioned terms.

2. Show which of the improvements itemized in the list dated January 19, 1948, prepared by Vernon L. Maxfield & Company, are permanent improvements essential to mining of coal on the lands, their present reasonable value and the extent to which the cost of their construction has been amortized in connection with the fulfillment of his contract with the Army for the production of coal from these lands.

In connection with the operation of the lands under the special permit, the records show that the mine tipple and certain appurtenant mining structures, including garage, bunk house, shop and residence, have been placed in the SW $\frac{1}{4}$ Sec. 24, T. 12 S., R. 7 W., F.M., which land is embraced in coal lease Fairbanks 01068 of the Healy River Coal Corporation, and necessitates the surface use of about 10 acres described as the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$, NW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$, N $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 24. Since the surface right to the 10 acres is necessary to the full enjoyment of a lease of the lands under application 06561, the right to use the surface of the 10 acres described will be

made available upon proper application if and when a lease is issued under that application.

Usibelli is allowed 60 days from service of notice hereof to comply with the above requirements, failing in which his lease application will be finally rejected. He has the right of appeal.

/s/ Marion Clawson, Director

cc: D.L.O. 2 G.S. 2 R.A. Reg I Northcutt Ely

[Endorsed]: T.C.U.S. Filed Oct. 16, 1953.

RESPONDENT'S EXHIBIT P

Radiogram

ZEW 92, ZEA127, KF 85, WA282 (Copy)

Received Fairbanks Land Office: Date April 5, 1946.

Hour 3:30 p.m.

KZEW V WDC NR C76 INT.

From Johnson Comm Dept of Int Washington DC
051849Z

To The Register US Dist Land Office Fairbanks
Alaska 00357 GRNC

Re your memorandum March 21 application for permit 06089 filed by Capt Byron L Waldruff for United States Army No authority of law to grant Peru 320 acres under Stction 10 Act October 20 1914 Under general authority the Army may mine coal on the S $\frac{1}{2}$ NE $\frac{1}{4}$ Sec 19 NE $\frac{1}{4}$ S $\frac{1}{2}$ NW $\frac{1}{4}$ Sec 20 T12S R6W FM provided mining is done under supervision of Mining Engineer Geological Survey

and if Army contracts for mining of coal by private parties such contractor must file a \$10000 bond conditioned upon proper mining in accordance with operating regulations and to the satisfaction of Geological Survey representative and that coal so mined will be used exclusively for the needs of the Army this permit unless otherwise terminated will expire six months after the cessation of hostilities in the present war as determined by proclamation of the President or concurrent resolution of the Congress approved Apr 5 1946 PD
1856Z

Admitted in Evidence October 16, 1953.

[Title of Tax Court and Causes 47797-98.]

TRANSCRIPT OF HEARING

Courtroom 815, Federal Court House, Seattle, Washington, Friday, October 16, 1953.

The above-entitled matter came on for hearing, pursuant to notice to the parties at 10:00 o'clock a.m.

Before Clarence V. Oppen, J., Presiding.

Appearances: A. R. Kehoe, Esq., 610 Coleman Building, Seattle, Washington, for petitioners; Gordon N. Cromwell, Esq., Attorney, Bureau of Internal Revenue, for respondent.

The Court: Are you ready to proceed, Gentlemen?

The Clerk: Docket Number 47797, Emil Usibelli

and Rose P. Usibelli. Docket Number 47798, Emil Usibelli.

State your appearances, please.

Mr. Kehoe: A. R. Kehoe for petitioners.

Mr. Cromwell: Gordon N. Cromwell for respondent.

Mr. Kehoe: We have stipulated all the facts. Most of the exhibits are joint exhibits. The government is introducing one additional exhibit, which is "P", which is subject to confirmation and I have agreed it will be withdrawn if it cannot be confirmed in Washington, D. C.

The Court: I want to know at a certain date if I have not heard the exhibit is withdrawn it will be of record.

Mr. Cromwell: I wired the Department of the Interior. I don't know how fast they will work. I ought to have it within the next week.

The Court: The difficulty would be the matter of how you can adequately prepare a brief until you know what the record is. I would say whatever time it would take, ordinarily, to get the transcript would be a reasonable time and it should not be longer than that.

Mr. Kehoe: I would have no specific objection but would have to have more than two weeks.

The Court: Within twenty days. Very well, if, within twenty days they have not stipulated to withdraw it——

Mr. Cromwell: It purports to be a permit issued by the Department of Interior to the United States Army to mine coal in Fairbanks. It is Exhibit "P".

The Court: I am talking of Exhibit "P". If I don't receive word within twenty days that it is agreed by the parties to be withdrawn it will be part of the record.

Mr. Kehoe: That is going at it backward.

The Court: It is going to be official.

Mr. Kehoe: I am agreeable to that procedure.

The Court: You better offer it and I suppose you filed the stipulation of facts.

Mr. Cromwell: I have the stipulation.

The Court: The stipulation is received.

Mr. Cromwell: I offer Respondent's Exhibit "P".

The Court: Subject to agreement just made it will be received and offered in evidence. What about briefs?

[See pages 39-40.]

Mr. Kehoe: I would prefer consecutive briefs rather than simultaneous briefs.

Mr. Cromwell: I would prefer simultaneous briefs.

Mr. Kehoe: I think it is a little more orderly under consecutive briefs but I will go along with the government's position. I would like forty-five days on the opening brief.

The Court: Forty-five days from now?

Mr. Cromwell: I believe we should take into consideration this document.

The Court: In other words, let us say sixty-five days.

Mr. Kehoe: That is satisfactory.

Mr. Cromwell: That is satisfactory.

The Court: And twenty days thereafter for each side to reply.

(Whereupon, at 10:10 o'clock, a.m., the hearing in the above entitled matter was closed.)

[Endorsed]: T.C.U.S. Filed Dec. 7, 1953.

[Title of Tax Court and Causes No. 47797-98.]

MEMORANDUM OPINION

Filed June 30, 1954.

A. R. Kehoe, Esq., for the petitioners.

Gordon N. Cromwell, Esq., for the respondent.

Murdock, Judge: The Commissioner determined deficiencies in income tax for 1947 and 1948 of \$1,476.69 and \$5,648.24. He also determined additions for 1947 of \$132.91 and \$88.60 under section 294(d)(1) and (2) for failure to file a Declaration of Estimated Tax and for substantial underestimation of Declaration of Estimated Tax. The only issue for decision is whether Emil is entitled to a deduction for percentage depletion in connection with his Alaskan coal mining operations. The facts have been presented by a stipulation, including exhibits, and by Exhibit P, all of which are adopted as findings of fact.

The petitioners are husband and wife. They filed a joint return for 1948 and Emil filed a separate return for 1947 with the collector of internal revenue for the District of Washington.

Emil was engaged in coal mining operations in Alaska during the taxable years. The Secretary of

the Interior of the United States granted special permission to the United States Army on April 5, 1946 to mine coal from specified Government land in Alaska. The permit provided that the Army might contract for the mining of coal for its own use by private parties. The mining here in question was done under the permit and extensions thereof.

The Army entered into a contract with Emil, who had filed a satisfactory bond. The contract was dated July 1, 1946 and was to expire on June 30, 1947. It provided that Emil was to furnish and deliver coal for Ladd Field, Alaska, from the mine at Suntrana, Alaska. The coal was to consist of 40,000 tons of mine run and 30,000 tons of lump nut. Emil was to place the coal on railroad cars at the mine, screened and graded. A minimum of 5,600 tons was to be delivered each month. The total amount to be paid Emil was \$362,500, computed at \$4.75 per ton of mine run and \$5.75 per ton of lump nut. The contract provided that it could be terminated by the Government in whole, or from time to time in part, whenever the contracting officer should determine that such action would be for the best interests of the Government and it provided how settlement would be made in case of termination. The Government could terminate the contract or reduce the specified quantities to be delivered if its requirements should change. The provisions of Article 19 entitled "Price Adjustments" were as follows:

In the event that during the contract period

changes should occur in working hours, wage scales, operating expense, or other conditions of employment which changes are a part of the general revision of such conditions within the producing district where the coal is mined, the parties hereto, upon the request in writing of one to the other within thirty (30) days after the effective date upon which any such change occurs, may redetermine by negotiation the unit price affected, provided that pending such negotiations the contractor shall continue deliveries hereunder. Any price redetermined as herein provided shall be applicable to all deliveries after the effective date upon which the change occurs permitting redetermination as herein provided.

Emil applied for and was granted an increase to \$5.47 per ton for mine run in September 1946 and the contract amount was correspondingly increased. The contract was changed in May 1947 to provide that all coal delivered should be mine run and to extend the delivery date to September 30, 1947, later extended to December 31, 1947 due to curtailing of deliveries by the Army.

Emil was invited to bid on the furnishing of coal to the Army for the fiscal year 1948, he submitted a bid on May 15, 1947, and was advised on May 19, 1947 that the Army intended to contract with him to furnish 70,000 tons during the period July 1, 1947 to June 30, 1948 as soon as funds were available.

The President of the United States proclaimed cessation of hostilities on December 31, 1946 and

the Army permit to mine the coal would have expired as a result on June 30, 1947 but it was extended to December 31, 1947 and later to the effective date of a lease which might be issued for the lands. Emil had applied for a lease of the lands on May 21, 1947. A lease was granted to Emil in 1949.

The Government, on August 25, 1947, ordered 45,000 tons of mine run, 25,000 tons of lump nut and 30,000 tons of steam and stoker coal to be delivered by Emil, pending the execution of a definite contract. The Army and Emil entered into a new contract dated July 1, 1947 covering the coal ordered on August 25, 1947 to be delivered between July 1, 1947 and June 30, 1948. The amount to be paid Emil was \$577,000, computed at \$5.22 per ton of mine run and \$6.22 per ton for the other grades. The other provisions of the contract were substantially the same as those in the earlier contract. The performance time was later extended to July 31, 1948.

Emil conducted mining operations under the contracts and the order during the taxable years. The Commissioner disallowed claimed depletion deductions of \$5,596.54 for 1947 and \$8,026.71 for 1948 with the explanation that Emil had no economic interest in the coal in place that he was mining for the United States Army.

The coal belonged at all times to the United States Government. Emil was merely employed on an annual basis to mine and load the coal for use by the Army. The coal was never sold. Emil was paid an agreed amount for the work which he per-

formed. The record does not show that his payments depended upon any sales or market prices of the coal but indicates that they depended upon mining costs. The fact that Emil was applying for a lease is immaterial since he was not a lessee during the taxable years. He could mine only limited quantities of coal and the amount could be reduced by the Government. The contracts could be terminated by the Government under certain circumstances.

A study of the entire arrangement between Emil and the Army fails to disclose any economic interest held by Emil in the coal in place as would be necessary to entitle him to deductions for percentage depletion. *Helvering vs. Bankline Oil Co.*, 303 U.S. 362; *Morrisdale Coal Mining Co.*, 19 T.C. 208; *The Mammoth Coal Co.*, 22 T.C. . . (June 16, 1954). Cf. *James Ruston*, 19 T.C. 284; *J. E. Vincent*, 19 T.C. 501, reversed in part sub nom *Commissioner vs. Gregory Run Coal Company, et al.*, . . F.2d . . , (April 9, 1954); *Helen C. Brown*, 22 T.C. . . (April 13, 1954).

Decision will be entered for the respondent.

The Tax Court of the United States
Washington

Docket No. 47797

EMIL USIBELLI and ROSE P. USIBELLI,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Opinion, filed June 30, 1954, it is

Ordered and Decided: That there is a deficiency in income tax of \$5,648.24 for the year 1948.

[Seal] /s/ J. E. MURDOCK,
Judge

Entered: July 6, 1954. Served July 6, 1954.

The Tax Court of the United States
Washington

Docket No. 47798

EMIL USIBELLI, Petitioner,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Opinion, filed June 30, 1954, it is

Ordered and Decided: That there is a deficiency in income tax of \$1,476.69 for the year 1947, and additions to tax of \$132.91 and \$88.60 for failure to file, and for substantial underestimation of Declaration of Estimated Tax, for the year 1947.

[Seal] /s/ J. E. MURDOCK,
 Judge

Entered: July 6, 1954. Served July 6, 1954.

In the United States Court of Appeals
for the Ninth Circuit

[Title of Tax Court Causes No. 47797-47798.]

PETITION FOR REVIEW

To the Honorable Judges of the United States
Court of Appeals for the Ninth Circuit:

The petitioners in the above proceedings hereby petition the United States Court of Appeals for the

Ninth Circuit to review the decision entered by the Tax Court of the United States in these proceedings on July 6, 1954: that for the calendar year 1947, for Emil Usibelli in Docket No. 47798, "there is a deficiency in income tax of \$1476.69 and additions to tax of \$132.91 and \$88.60 for failure to file, and for substantial understatement of declaration of estimated tax,"; and for Emil Usibelli and Rose P. Usibelli for the calendar year 1948, "that there is a deficiency in income tax of \$5648.24". This Petition for Review is filed pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code in effect prior to the passage of the Internal Revenue Code of 1954, and Sections 7482 and 7483 of the Internal Revenue Code of 1954.

At all times material herein, petitioners were individuals, husband and wife, residing at Suntrana, Alaska. The returns for years involved were filed with the Collector of Internal Revenue for the District of Washington, in Tacoma, Washington which is in the jurisdiction of the United States Court of Appeals for the Ninth Circuit. The coal mining operations involved in these proceedings were returned on an accrual basis. The individual return of Emil Usibelli for the calendar year 1947 is involved in Docket No. 47798. The joint return of Emil Usibelli and Rose P. Usibelli for the calendar year 1948, is involved in Docket No. 47797. The parties to these proceedings have stipulated in the Tax Court hearing that the matters might be consolidated for trial.

Nature of Controversy

The sole question involved is the question of whether, in determining the net income of petitioners from Emil Usibelli's coal mining operation in Alaska, they are entitled to a deduction for depletion in the amount of \$5596.54 for the year 1947 and \$8026.71 for the year 1948. If such deduction for depletion is available, there is no basis for the application of the penalty determined by the Tax Court in Docket No. 47798 for failure to file, and for substantial underestimation of Declaration of Estimated Tax, for the year 1947. The question of whether or not the petitioners have the right to a depletion deduction for these years hinges on the question of whether or not they had an economic interest in certain coal lands in Alaska from which coal was mined and sold to the United States Army. The coal was mined on land under the jurisdiction of the Bureau of Land Management of the Department of the Interior of the United States. Petitioners had filed an application for a mining lease under the "Coal Leasing Act" of Congress providing for the leasing of coal lands in the Territory of Alaska (38 Stat. 741), and their application was pending during the years involved herein. Meanwhile, the United States Army had a special permit from the Department of the Interior giving them access to the coal lands and under the permit the Army could arrange for a private operator to strip-mine the coal and sell it to the Army providing a proper bond was posted. The Army entered into a contract with petitioners under date of July

1, 1946, providing that petitioners were to furnish and deliver coal for Ladd Field Alaska from the mine at Suntrana, Alaska. The coal was to consist of 40,000 tons of mine run and 30,000 tons of lump nut. The total amount to be paid petitioners for the coal was \$362,500. computed at \$4.75 per ton of mine run coal and \$5.75 per ton of lump nut coal. The Army and petitioners entered into a second contract dated July 1, 1947, covering 45,000 tons of mine run coal, 25,000 tons of lump nut coal, and 30,000 tons of steam and stoker coal. The amount to be paid petitioners under this contract was \$577,000. computed at \$5.22 per ton for mine run coal and \$6.22 per ton for the other grades. Under these contracts, the first of which was to run from July 1, 1946 to June 30, 1947 and the second of which was to run from July 1, 1947 to June 30, 1948, petitioners were specifically granted the right to mine the coal on the lands embraced in the Army permit. In addition, the Army arranged for its permit to continue until petitioner's lease was available from the Department of the Interior. Petitioners filed the necessary bond as required by the permit.

While operating under the first Army contract, on September 3, 1946, petitioners made an application to the Office of Price Administration in Juneau, Alaska, for an increase in the maximum prices for coal produced and on September 30, 1946, petitioners were granted an increase in mine run coal to \$5.47 per ton. This increase was reflected in a modification of the first army contract

under date of October 22, 1946 providing for an increase in the contract price of the coal by \$28,800, this amount covering the increase in the price of mine run coal from \$4.75 to \$5.47 per ton.

The Tax Court held in a memorandum opinion by Judge Murdock filed June 30, 1954, that petitioners were merely employed on an annual basis to mine and load the coal for use by the Army, and that the coal was never sold. Judge Murdock stated in his memorandum opinion, "a study of the entire arrangement between Emil Usibelli and the Army fails to disclose any economic interest held by Emil in the coal in place as would be necessary to entitle him to deductions for percentage depletion". It is submitted that petitioners had an economic interest in the coal lands under the Army contracts and under their permits granted by the Army with approval of the Bureau of Land Management of the Department of Interior, and they were entitled to the depletion deduction for the years 1947 and 1948.

Wherefore, petitioners petition that the original record in the United States Tax Court Docket Nos. 47797 and 47798 be certified and transmitted to the Court of the United States Court of Appeals for the Ninth Circuit for filing and appropriate action, to the end that the errors complained of may be reviewed and corrected by the said United States Court of Appeals for the Ninth Circuit.

/s/ A. R. KEHOE

Duly Verified.

[Endorsed]: T.C.U.S. Filed September 22, 1954.

[Title of Tax Court and Causes No. 47797-98.]

NOTICE OF FILING PETITION FOR
REVIEW

To: Daniel A. Taylor, Chief Counsel, Internal Revenue Service, Internal Revenue Building, Washington, D. C.

You are hereby notified that the above petitioners have filed with the Clerk of the United States Tax Court, at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit, of the decision of the Tax Court heretofore rendered in the above entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 20th day of September, 1954.

/s/ A. R. KEHOE,
Counsel for Petitioners

Acknowledgment of Service attached.

[Endorsed]: T.C.U.S. Filed September 23, 1954.

[Title of Tax Court and Causes No. 47797-98.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To: The Clerk of the Above Entitled Court:

Petitioner, by and through A. R. Kehoe, his attorney, hereby designates the entire record in this case to be contained in the record on appeal, the

appeal to be heard on the original papers under Rule 11 of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit.

/s/ A. R. KEHOE,

Attorney for Petitioner

Acknowledgment of Service attached.

[Endorsed]: T.C.U.S. Filed September 23, 1954.

[Title of Tax Court and Causes No. 47797-98.]

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States, do hereby certify that the foregoing documents 1 to 30, inclusive, constitute and are all of the original papers and proceedings, including Respondent's exhibits (A and B) and Joint exhibits (3-C through 15-O), attached to the Stipulation of Facts and Respondent's exhibit (P) admitted in evidence, on file in my office as called for by the "Designation as to Contents of Record on Review" in the proceedings before The Tax Court of the United States entitled: "Emil Usibelli and Rose P. Usibelli, Petitioners, vs. Commissioner of Internal Revenue, Respondent, Docket No. 47797," and "Emil Usibelli, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 47798," and in which the petitioners in The Tax Court proceedings have initiated appeals as above numbered and entitled, together with a true copy of the docket

entries in said Tax Court proceedings, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 12th day of October, 1954.

[Seal] /s/ VICTOR S. MERSCH,
Clerk,
The Tax Court of the United
States

[Endorsed]: No. 14559. United States Court of Appeals for the Ninth Circuit. Emil Usibelli and Rose P. Usibelli, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: October 22, 1954.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14559

EMIL USIBELLI and ROSE P. USIBELLI,
Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

EMIL USIBELLI, Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

STATEMENT OF POINTS ON APPEAL

Appellant hereby designates the following Statement of Points on which he intends to rely in his appeal from the decision of the United States Tax Court made and entered July 6, 1954, in Tax Court Docket Nos. 47797 and 47798.

I.

The Tax Court erred in finding that under Appellant's permit and contracts with the Army during the years 1947 and 1948, he was merely employed on an annual basis to mine and load coal for use by the Army and that the coal was never sold and the entire arrangement between Appellant and the Army fails to disclose any economic interest held by Appellant in the coal in place as would be necessary to entitle him to deductions for percentage depletion.

II.

The Tax Court erred in failing to find that Appellant had an economic interest in the coal in place in 1947 and 1948 that would entitle him to a deduction for depletion in the amount of \$5596.54 for 1947 and \$8026.71 for 1948.

III.

The Tax Court erred in determining a deficiency in income tax of \$1476.69 and additions to tax of \$132.91 and \$88.60 for failure to file and substantial understatement of estimated tax for Emil Usibelli for the calendar year 1946 and a deficiency in income tax of \$5648.24 for Emil Usibelli and Rose P. Usibelli on a joint return for the calendar year 1948.

/s/ A. R. KEHOE,

Counsel for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed November 15, 1954. Paul P. O'Brien, clerk.

[Title of U. S. Court of Appeals and Causes.]

APPELLANT'S DESIGNATION OF RECORD

To the Clerk of the Above Entitled Court:

Appellant designates the following portions of the record to be printed:

Tax Court Dockets Nos. 47797 and 47798.

1. Docket Entries No. 47797.

2. Docket Entries No. 47798.
 3. Petition No. 47797.
 4. Answer No. 47797.
 5. Petition No. 47798.
 6. Answer No. 47798.
 7. Motion to consolidate—Granted.
 8. Minutes of Proceedings before the Tax Court of the United States.
 9. Stipulation of Facts but Exhibits not to be printed.
 10. Respondent's Exhibit P admitted in evidence but Exhibit P not to be printed.
 11. Official Report of Proceedings before the Tax Court of the United States.
 12. Memorandum Opinion.
 13. Decision No. 47797.
 14. Decision No. 47798.
 15. Petition for Review.
 16. Proof of Service.
 17. Designation of Contents of Record on Appeal and Proof of Service.
- United States Court of Appeals for the Ninth Circuit No. 14559:
18. Appellant's Designation of the Contents of the Record to be Printed.

19. Application by appellant to be Relieved from Printing or Reproducing the Exhibits.

20. Order Dispensing with Printing or Reproducing of Exhibits.

21. Statement of Points on Appeal.

/s/ A. R. KEHOE,
Counsel for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed November 15, 1954. Paul P. O'Brien, clerk.

[Title of U. S. Court of Appeals and Cause.]

APPLICATION BY APPELLANT TO BE RELIEVED FROM PRINTING OR REPRODUCING THE EXHIBITS

Comes Now the Appellant, and respectfully applies to and moves the above entitled Court for an Order relieving the Appellant from printing or reproducing the Exhibits in this case, except for Exhibits 10-J, 11-K, and P, in the printed Transcript of Record on Appeal, and ordering that all said exhibits except for Exhibits 10-J, 11-K and P, be considered by this Court in their original form indetermining the questions involved in this appeal, without such exhibits being so printed or reproduced, and as though they were fully set forth in said printed Transcript of Record. This application is based upon the grounds that said Exhibits are voluminous, that some of them are not of a printable type, that some

of the others are not easily printable, that the inclusion of all of the exhibits, except for Exhibits 10-J, 11-K and P, in the printed Transcript of Record would make it extraordinarily long, and that the cost would be greatly disproportionate to the convenience of having them all so included as in all probability there will be very little need to refer to many of them. This application is supported by the Stipulation by the parties hereto filed herewith.

/s/ A. R. KEHOE,
Counsel for Appellant

and

It Is Hereby Stipulated and Agreed by and between Appellant and Appellee herein, appearing and acting by and through their said respective attorneys, that all of the exhibits other than Exhibits 10-J, 11-K and P, introduced in evidence at the trial of the above entitled case, may be considered in their original form by the above entitled court in determining the questions involved in this Appeal; that for the reasons stated in said application, the said parties do not consider it necessary or practical to print or otherwise reproduce said exhibits in the printed Transcript of Record on Appeal, and the parties herein respectfully request the above entitled Court to consider each and all of the said exhibits in their original form as though the said exhibits had been printed or otherwise reproduced in the printed Transcript of Record, and further request the above entitled Court to make and enter an Order granting Appellant's said ap-

plication. The parties are agreed that Exhibits 10-J, 11-K and P be included in the printed Transcript of Record on Appeal.

Dated, November 12th, 1954.

/s/ A. R. KEHOE,

Counsel for Appellant

/s/ H. BRIAN HOLLAND,

Assistant Attorney General,

Counsel for Appellee

[Endorsed]: Filed November 23, 1954. Paul P. O'Brien, Clerk.